87-138

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term, 1987

VINCENT NICOLOSI, GLEN E. BROWN, PHILIP LOMBARDO and RICHARD DELUCA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does a Fifth Amendment claim, recognized by the court, justify a failure to provide financial data on income tax returns or is such a failure to reveal the protected information on income tax returns frivolous and subject to Code §6702 "frivolous return penalties" dealing with spurious Fifth Amendment claims and tax protestors.

2. Is summary judgment appropriate with regard to the frivolous return penalty solely on the fact that despite this court's decision in *Garner v. U.S.*, 424 U.S. 648, failure to provide the proper financial data on income tax returns cannot be justified under the Fifth Amendment.

3. Can costs and attorneys' fees be awarded under Federal Rules of Civil Procedure 11 with regard to any assertion of the Fifth Amendment privilege, especially when the court partially recognizes its validity.

LIST OF PARTIES

Petitioners, Vincent Nicolosi, Glen E. Brown, Philip Lombardo and Richard DeLuca were plaintiffs in the United States District Court, for the District of New Jersey and appealed to the Third Circuit United States Court of Appeals.

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IN THE

Supreme Court of the United States

October Term, 1987

VINCENT NICOLOSI, GLEN E. BROWN, PHILIP LOMBARDO and RICHARD DELUCA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Vincent Nicolosi, et al. pray that a writ of certiorari issue to review a final judgment and order of the United States Court of Appeals for the Third Circuit decided April 22, 1987 (Appendix A infra) which affirmed the judgment of the United States District Court for the District of New Jersey (Stern, J.) granting summary judgment to respondent, dismissing appellants' complaints seeking a refund of penalties assessed for filing frivolous tax returns and awarding respondent attorneys' fees and costs under Federal Rules of Civil Procedure 11 (Appendix B).

This petition should be associated with the petition of *Leogrande, et al. v. U.S.*, Docket No. 86-1807 previously filed with this court.

THE OPINION OF THE COURT BELOW

The court below, namely the United States Court of Appeals for the Third Circuit "affirmed" the decision and judgment, as set forth in Appendix A.

JURISDICTION

The order of the judgment of the United States Court of Appeals for the Third Circuit, the court below, is dated April 22, 1987. Jurisdiction of this court is invoked, made and conferred under 28 U.S. Code §1254(1).

THE PRINCIPAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the Constitution, Sixth Amendment to the Constitution, Title 26, U.S. Code §6702-6703. Federal Rules of Civil Procedure 11.

STATEMENT OF THE CASE

The facts are undisputed. All of the aforementioned petitioners informed the Internal Revenue Service via unsigned, forwarded forms 1040 that they relied on the Fifth and Sixth Amendments to the Constitution of the United States and the only information contained thereon pertained to neutral identification questions, i.e., name, address, Social Security number, and amount of estimated tax payments made.

The United States asserted the Civil frivolous return penalty under 26 U.S. Code §6702 and subsequently moved for summary judgment.

Each of the petitioners via opposition to motion for summary judgment offered specific basis for each of their claims, constituting a positive disclosure where the danger lies, i.e., Glen E. Brown—CV 85-5286, Fifth Amendment claim honored re subpoena issued by Southern District U.S. Attorney's Office in *U.S. v. Hermina Perlmutter.*

Philip Lombardo—CV 85-5285, alluded to be head of alleged organized crime family, i.e., Genovese.

Richard DeLuca—CV 85-5287, presently under investigation by Justice Department.

Vincent Nicolosi—CV 85-5284, listed as an organized crime figure by the Department of Justice and recent convictions.

Under these circumstances, the Fifth Amendment claim clearly articulated by these taxpayers cannot be considered frivolous and it must be deemed admitted that income tax returns, although directed at all taxpayers equally, the privilege against self-incrimination is available in connection therewith. Consequently, persons who make disclosures on their income tax returns, waive the privilege by failing to claim it, as in *** *Garner,* 424 U.S. 648 (1976).

The court below (Hon. Herbert J. Stern, U.S.D.J.) ruled: 1) it is not a return (unsigned); 2) improper invocation of privilege; 3) recognized that "such men may well have a legitimate Fifth Amendment claim as to their income and deductions, but I don't see how they could have even a colorable claim to answer such questions as whether they are married or single or how many exemptions they have or don't have, what their spouse's Social Security number is."

These facts should have led the Judge to make an exceedingly careful inquiry into waiver and lead affects rather than the unmistakable implication that the Court has adopted a penalty for recognized Fifth Amendment claims. The Court is attempting to force these taxpayers to surrender ascertained valid Fifth Amendment claims. Moreover, any Constitutional privilege taxpayers may have are immediately threatened by the Government having obtained such highly sensitive personal information (leads), which interests will not be adequately protected in subsequent trial proceedings. This does not justify Fifth Amendment infringement without accommodation.

This sort of judicial sleight of hand is unwarranted since the result is a rule not intended by the Legislature, the latter specifically identifying "*spurious* Fifth Amendment claims" as triggering this penalty.

Further, the Court indicated, contrary to *Garner, supra,* citing *U.S. v. Sullivan,* 274 U.S. 259 (1927) that no decent society, at least the way we conduct outselves, would require them to say words or do things which will incriminate them or unmask their otherwise unlawful activities. But they are not to use our sense of decency and correctness as a vehicle for evading their civil obligations or refusing to make any sort of account whatever.

Not a Return Unsigned

As was specifically revealed by United States District Court Judge Stern, he mandated that petitioners herein must certify as to honesty and veracity by signing "Under penalty of perjury, I declare that I have examined the return and accompanying schedules and statements and to the best of my knowledge they are true, correct and complete." It must be conceded that if petitioners had signed that statement, it would have triggered a probable criminal violation under 26 U.S. Code §7206(1), false statement

and subscription since it is obvious that these forms are not complete.

Improper Invocation of Privilege

Judge Stern specifically determined that the petitioners "may well have had a legitimate Fifth Amendment claim as to their income and deductions," citing Chief Justice John Marshal 'In re *Willie*' test, which was the prosecution of Aaron Burr for treason where his secretary, Willie, was called to the stand and in respect to certain questions concerning the Code with which—in which Burr's diary had been written, Willie refused to answer.

After taking a recess over the evening, Marshal came in the next morning and announced the test, which remains to this day the test, although he's probably right. He said:

> Unless the court, by looking at the question alone, can say that no answer could possibly incriminate, if, under any circumstances, an answer could be 'forged into a link in a chain'—those were the very words he used 'link in a chain' all the way back there in the first quarter of the nineteenth century—then the court on its own must dignify and grant the refusal to answer. The one invoking privilege is not to be required to show how the privilege is implicated.

"I said, he improperly employed it because he ordered the witness to answer. Whether Willie understood the codes with—Aaron Burr's diary was written at the time when Burr was prosecuted for perjury.

The test was remarkable. The application was astounding."

In the extant situation, apparently duplicating the court's described "astounding application by Chief Judge

Marshal," Judge Stern failed to recognize the leads that could be forthcoming from name and Social Security number of wife, if any, number of exemptions (names required), etc. or effect of waiver.

Moreover, in *Quinn v. U.S.*, 349 U.S. 155, 162-163 (1955), it was stated that there is no prescribed litany to claim the privilege against self-incrimination, and that if objection, based on the right is made in any language, the addressee can reasonably be expected to understand the response to be an attempt to invoke the right of silence. As everyone agrees, no ritualistic formula is necessary to invoke the privilege at 164.

It makes no difference whether one's constitutional rights are denied from the beginning or withdrawn at a later time under guise of, despite Fifth Amendment protections and this court's rationale in *Garner, supra,* Judge Stern's promulgation from the bench "They have no immunity against the payment of income tax." Expansion of this theory might easily result in allowing such testimony to be used to prove that by committing an offense, a defendant waives the right to remain silent as to the proceeds therefrom; the latter available as evidence against him.

REASONS FOR GRANTING THE PETITION

1. Resolve conflict between Circuits
2. Whether holding that no justification exists under Fifth Amendment to withhold financial data from income tax returns is unconstitutionally overbroad
3. Clarifying basis for Rule 11 awards.

POINT I

WHETHER A PENALTY CAN BE EXTRACTED UNDER 26 U.S. CODE §6702 FOR THE CLAIMING OF THE RIGHT TO SILENCE UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION, SUBSEQUENT TO COURT RECOGNITION THAT A LEGITIMATE FIFTH AMENDMENT CLAIM AS TO INCOME AND DEDUCTIONS MAY EXIST.

It is the Internal Revenue Service and not the taxpayers that bears the burden of proof in asserting the frivolous return penalty under Code §§6702-3.

Applicability of §6702 to Petitioners' Forms 1040

§6702 was enacted in order to curb the proliferation of protest returns received by the Internal Revenue Service. §6702(a) provides that if:

> 1) any individual files what purports to be a return of the tax imposed by Subtitle A but which—
> (A) does not contain information on which the substantial correctness of the self-assessment may be judged, or
> (B) contains information that on its face indicates that the self-assessment is substantially incorrect; and
> 2) The conduct referred to in paragraph (1) is due to—
> (A) a position which is frivolous, or
> (B) a desire (which appears on the purported return) to delay or impede the administration of Federal Income Tax Laws, then such individual shall pay a penalty of $500.

A tax provision which imposes a penalty is to be construed strictly; a penalty cannot be assessed unless the words of the provision plainly impose it. *Commissioner v. Acker,* 361 U.S. 87, 91 (1959).

A. *Do these forms 1040 "purport" to be a tax return?* A §6702 penalty may not be assessed until the submission at issue "purports to be a tax return." None of these forms 1040 meets this requirement. Although the form submitted to the Internal Revenue Service is labeled "U.S. Individual Income Tax return," none was signed or calculated income, deductions, or tax. S.Rep. No. 494, 97th Cong, 2d Sess. 278 reprinted in 1982 U.S. Code Cong and Admin News 781, 1024 (this penalty will be immediately assessable against any individual filing a return in which many or all of the line items are not filled in except for references to *spurious* constitutional objections.

Judge Stern recognized that legitimate Fifth Amendment claims may exist for these petitioners as to income and deductions, but fails to acknowledge the obvious leads that could be acquired from spouse's Social Security number and exemptions claimed. Solely based on the latter determination and the fact that no immunity exists against payment of income tax, Judge Stern summarily sustained the frivolous return penalty, and assessed costs, contrary to legislative intent and basis for assertion of same.

Fifth Amendment

A witness is generally entitled to invoke the Fifth Amendment privilege against self-incrimination whenever there is a realistic possibility that his answer to a question can be used in any way to convict him of a crime. It need not be probable that a criminal prosecution will be brought or that the witness' answer will be introduced at a later prosecution; the witness need only show a realistic possibility that his answer will be used against him. Moreover, the Fifth Amendment forbids not only the compulsion of testimony that would itself be admissible in

a criminal prosecution, but also the compulsion of testimony, whether or not it's admissible that may aid in the development of other incriminating evidence that can be used at trial. *Pillsbury Co., et al. v. Conboy,* 459 U.S. 248, 74 L.Ed.2d 430, 103 S.Ct. 608 (1983) Justice Marshal concurrence n. 1 citing *Hoffman v. U.S.,* 341 U.S. 479, 486 (1951).

In *Pillsbury, supra,* Justice Stevens, with whom Justice O'Connor joined dissenting stated:

> "A witness in a judicial proceeding has a duty to answer proper questions. The witness cannot, however, be compelled to incriminate himself. If a witness believes a truthful response to a question could be used against him in a subsequent criminal proceeding, or it might lead to the discovery of incriminating evidence, he may assert his constitutional right to remain silent. When such an assertion is made, a Judge must evaluate the asserted risk. If it clearly appears that the answer could not be used against the witness in a subsequent criminal proceeding and could not provide a prosecutor with any information that he does not already have, the witness must speak."

In *Maness v. Myers,* 419 U.S. 449, 95 S.Ct. 584, 42 L.Ed.2d 574, it was stated that a lawyer may not be held in contempt for counseling his client in good faith to assert the Fifth Amendment and refuse to produce court-ordered materials.

Waiver

There are three different views pertaining to waiver:

Broad View—witness discloses a fact or transaction without invoking his privilege against self-incrimination, thereby waives that privilege with respect to the details of particulars of such fact or transaction.

Prevailing View—disclosure by witness made without invoking his constitutional privilege goes to the extent of showing a criminal transaction on his part, it is a waiver of privilege in respect of details and particulars of the fact or transaction disclosed. *Rogers v. U.S.*, 340 U.S. 367.

The witness has admitted commission of a crime, he cannot be compelled against privilege claim, to answer a question, when without the answer, it is not possible for Government to convict and punish and answer to that question will probably make possible such conviction and punishment.

Thus, any answer other than that required for identification, i.e., name and address, could be deemed a waiver, and it is unknown to what extent that waiver is applicable.

Respondent makes great moment of the following decisions: *U.S. v. Edelson,* 604 F.2d 232, 234-235 (3d Cir. 1979); *Eicher v. U.S.*, 774 F.2d 27, 29 (1st Cir. 1985); *U.S. v. Schiff,* 612 F.2d 73, 77, 83 (2d Cir. 1979); *Moore v. Commissioner,* 722 F.2d 193, 195 (5th Cir. 1984); *Ueckert v. Commissioner,* 721 F.2d 248, 250 (8th Cir. 1983); *U.S. v. Heise,* 709 F.2d 449, 451 (6th Cir. 1983), cert. den., 464 U.S. 918 (1983); *U.S. v. Verkuilen,* 690 F.2d 648, 654 (7th Cir. 1982); *Boomer v. U.S.*, 755 F.2d 696 (8th Cir. 1985); *U.S. v. Neff,* 615 F.2d 1235, 1239 (9th Cir. 1980), cert. den. 447 U.S. 925 (1980); *U.S. v. Brown,* 600 F.2d 248, 251-252 (10th Cir. 1979), cert. den. 444 U.S. 917 (1979); *Ricket v. U.S.*, 773 F.2d 1214 (11th Cir. 1985).

These cases, cited by respondent are either distinguishable or otherwise non-controlling. Cases cited by respondent dealt with tax protestors with no viable Fifth Amendment claim, where herein the District Court

conceded that these taxpayers may well have legitimate Fifth Amendment claims.

These cases purportedly stand for the following principles:

1) It is well established that tax forms that do not contain financial information upon which a taxpayer's tax liability can be determined, do not constitute returns within the meaning of the Internal Revenue Code. *Edelson, Eicher* and *Verkuilen.*

2) Constitutional claims meritless—*Eicher, Ueckert, Edelson* and *Boomer.*

3) *Schiff* and *Brown* stand for the propositions that "the law applicable to this case is that a taxpayer can comply with the tax laws and exercise Fifth Amendment rights by listing the amount not source of income from illegal sources in direct conflict with the Second Circuit decision in *U.S. v. Barnes,* 604 F.2d at 147-148 which disclosed that "the right to make a valid claim of privilege is available even as to amount of taxpayer's income, as well as any other item on the return which could legitimately cause self-incrimination. *** Since appellants did not claim the privilege on their returns, their Fifth Amendment rights were not violated at trial.

4) Failure to provide the proper financial data on an income tax return amounts to total failure to file a return, which cannot be justified under the Fifth Amendment. *Heise* (tax protestor).

In contrast, these taxpayers have made sufficient showing for the court to recognize Fifth Amendment claims specifically as to source and amount of income.

The Ninth Circuit, in *Neff, supra,* disclaimed this alleged talismanic proposition in 4 above as being inappropriate because it lacks independent Fifth Amendment analysis and chose to apply more traditional Fifth Amendment analysis disavowing that this proposition has value as a means to determine the validity of an assertion of the privilege against self-incrimination. n. 4.

After setting forth pertinent Fifth Amendment principles, the Ninth Circuit in *Neff* decided that no Fifth Amendment claim existed directly contrary to Judge Stern's recognition of Fifth Amendment claims made herein as to source and amount of income.

The Court cited the following:

1) To claim the privilege validly, a defendant must be faced with substantial hazards of self-incrimination that are real and appreciable and not merely imaginary and unsubstantial—recognized here.

2) Reasonable cause to apprehend [such] danger from a direct answer to questions posed to him—partially recognized here.

3) The information that would be revealed by direct answer need not be such as would itself support a criminal conviction, however, but must simply "furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." Indeed, it is enough if the responses would merely provide a lead or clue to evidence having a tendency to incriminate—recognized here as to source and amount of income but not as to spouse, if any, or exemp-

tion claimed (latter could be identified for future witness use). Indicia of potential incrimination was disclosed and partially recognized by the court.

Thus, conflict and disarray appears to exist with regard to the accommodation to be granted to Fifth Amendment claims as it is applied to income tax returns.

The Ninth Circuit's finding would appear to be analagous to the Fourth Circuit's decision in *J. F. Shaffer,* 528 F.2d 920, refusing to permit the Internal Revenue Service to use discovery procedures in a civil action to develop information that it is barred from obtaining in a criminal proceeding against the same taxpayer citing *Ianelli v. Long,* 3d Cir., 487 F.2d 317 (1973).

The Courts adopting the position: failure to provide the proper financial data on an income tax return amounts to total failure to file a return which cannot be justified under the Fifth Amendment directly conflicts with this court's rationale in *Garner,* 424 U.S. at 648 (1976) at n. 21. "No language in this opinion is to be read as allowing a taxpayer desiring the protection of the privilege to make disclosures concurrently with a claim of privilege and thereby to immunize himself against the use of such disclosures. If a taxpayer desires the protection of the privilege, he must claim it instead of making disclosures. Any other rule would deprive the Government of its choice between compelling the evidence of the claimant in exchange for immunity and avoiding the burdens of immunization by obtaining the evidence elsewhere. See *Mackey v. U.S.,* 401 U.S. at 711-713, 91 S.Ct. 1169-71; 28 L.Ed.2d 431-433 (Brennan, J. concurring in judgment)."

It should be noted that respondent is attempting to have the courts adopt that which this court specifically re-

jected in *Garner* at n.16, i.e., that requiring certain basic disclosures fundamental to a neutral reporting scheme, does not violate the privilege. At n.16 in *Garner*, this court specifically indicated that only the basic requirement, that one's name and address be disclosed, was addressed in *Byers*, 402 U.S. 424, 91 S.Ct. 1535, 29 L.Ed.2d (1971).

There exists historically and constitutionally a guaranteed right of a defendant or potential defendant to remain completely silent requiring the State to prove its case without any assistance of any kind from the defendant himself. *Williams v. Florida,* 399 U.S. 78,198; 90 S.Ct. at 1909.

It was further indicated at 424 U.S. at 651-652 and n6 in *Garner,* that:

> §7602(2) of the Code authorizes the Service in such circumstances to summons the taxpayer to appear and to produce records or give testimony. If Garner had persisted in his claim when summoned, the Service could have sued for enforcement in District Court, subjecting Garner to the threat of the Court's contempt power.
>
> 18 U.S. Code 6004 would appear to authorize the Service as an alternative to an enforcement suit, to order a summoned taxpayer to make disclosures in exchange for immunity.

Moreover, in *Garner, supra,* this court specifically determined that only a willful failure to make a return is punishable under §7203 and that a defendant could not properly be convicted for an erroneous claim of privilege asserted in good faith. Judge Stern has determined that these taxpayers may have a Fifth Amendment claim as to source and amount of income. To now determine summarily that although they are now publicly entitled to acquittal with regard to §7203 but subject to a frivolous

return penalty, is a contradiction which this court should not accept.

POINT II

INAPPLICABILITY OF SUMMARY JUDGMENT AND SANCTIONS

Summary judgment is a drastic remedy and should not be granted when there is any doubt as to the existence of a triable issue or where the issue is even arguable. The court, in its decision, recognizing possible Fifth Amendment claims as to source and amount of income, was precluded from granting summary judgment with regard to the §6702 penalty, since the latter is applicable to *spurious* Fifth Amendment claims determined not to exist here. Evidence exists and was recognized that Fifth Amendment claims were neither spurious or frivolous.

Thus, no evidence exists for assertion of the frivolous return penalty under §6702 or in support of summary judgment.

Sanctions

In imposing sanctions under Rule 11, all doubts should be resolved in favor of the lawyer who signed the paper at issue. A more precise analysis reveals that the court conceded that these taxpayers may have Fifth Amendment claims as to source and amount of income, thus recognizing the foundational good faith for Fifth Amendment claims which bars §6702 violations as well as penalties to be derived under Rules of Civil Procedure 11. See also *Maness v. Myers, supra.*

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: New York, New York
July 16, 1987

Respectfully submitted,

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APPENDIX A—FINAL JUDGMENT AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DECIDED APRIL 22, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 86-5718

VINCENT NICOLOSI,

Appellant

v.

UNITED STATES OF AMERICA

On Appeal from the United States District Court
for the District of New Jersey
Civil No. 85-5284
Honorable Herbert J. Stern

Submitted Under Third Circuit Rule 12(6)
April 10, 1987

Before: SLOVITER, BECKER and GARTH,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT
s/ A R Becker
Circuit Judge
ATTEST:
s/ Sally Mrvos
Sally Mrvos, Clerk

DATED: APR 22 1987

APPENDIX B—JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

VINCENT NICOLOSI, et al.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

HON. J. STERN
CIVIL ACTION NO. 85-5284
JUDGE RONALD J. HEDGES
U.S. MAGISTRATE

ORDER

This matter, having come before the Court on the defendant's motion for summary judgment and for an award of costs and attorneys' fees, the submissions of the parties having been considered, and for good cause shown, it is hereby

ORDERED that the motion of the defendant is granted and the complaint is dismissed with prejudice,

IT IS FURTHER ORDERED that pursuant to Rule 11 of the Federal Rules of Civil Procedure, judgment be entered agaisnt the plaintiff for the United State's attorneys' fees and costs incurred in defending this action,

IT IS FURTHER ORDERED that the United States shall submit a statement of its costs and attorneys' fees within 15 days of the entry of this order.

Dated: 9/5/86

s/ HJS
United States District
HERBERT J. STERN

FILED
SEP 3 1986
WILLIAM T. WALSH
CLERK